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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 567

IRVING GARBER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BURTON S. COOPER
Attorney for Petitioner
235 East 42nd Street
New York, New York 10017

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In the

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No.

Irving Garber,

Petitioner,

—v.—

United States of America,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on July 22, 1970.

Opinions Below

The opinion of the District Court of the Southern District of New York, which is not reported, was rendered on a pre-trial motion to dismiss the indictment a copy of which is appended hereto at pp. A16-18 of the Appendix. The Court of Appeals for the Second Circuit rendered an opinion, a copy of which is appended hereto at pp. A1-15 of the Appendix, on July 22, 1970, which opinion has not as yet been reported.

Jurisdiction

The jurisdiction of this court is invoked under Title 28 of the U.S.C. 1254(1) which provides for review by the Supreme Court:

> "By writ of certiorari upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree."

Questions Presented

The questions presented are:

1. Whether the parameters of the "required records" doctrine enunciated in *Shapiro* v. *United States*, 335 U.S. 1, 92 L.Ed. 1787, 68 S.Ct. 1375 (1948) sanctions the compulsory production of the business records of, a non-corporate, regulated business when such production is unconnected to any regulatory purpose and is compelled solely for the purpose of a criminal prosecution.

2. Whether, by virtue of this court's decisions after *Shapiro*, the principles upon which that decision rested have been so eroded that the doctrine is no longer viable.

Constitution, Statutes, Federal Rules and Regulations Involved

The pertinent portions of the Fifth Amendment of the United States Constitution, 18 U.S.C. Section 371, Securities Act of 1933 (15 U.S.C. Section 77q(a) and 77x), 17 C.F.R. 240.17a-4(a)(g), are set forth in the Appendix at pp. A19-21.

Statement

Petitioner was convicted of conspiracy under 18 U.S.C. Section 371 to violate the anti-fraud provisions of the Securities Act of 1933 (15 U.S.C. Section 77q(a) and 77x). The conviction arose out of events occurring during petitioner's operation of his non-corporate broker-dealer enterprise, Nassau Securities Service, in the months of May and June 1963.

Petitioner had resigned as registered representative and had gone out of business as a broker-dealer on September 1, 1965 (Appendix, p. A25). Two years later, on August 15, 1967, he, together with his broker-dealer records of his non-corporate firm, were subpoenaed to the Grand Jury. When he objected thereto, he was ordered by the Honorable John M. Cannella, a Judge of the United States District Court for the Southern District of New York, to comply with the subpoena and he did (Appendix p. A26).

Petitioner was indicted on June 3, 1968. Thereafter, petitioner, who appeared pro-se both before and during trial, moved the District Court to dismiss the indictment on the grounds, inter alia, that the compulsory production of his non-corporate business records violated his constitutional privilege against self-incrimination. On October 25, 1968, the motion was denied by order of the Honorable Irving Ben Cooper, United States District Judge for the Southern District of New York (Appendix pp. A16-18). The motion was renewed at the trial and was again denied (Appendix pp. A28-31). Over his objection, his records

were introduced into evidence. He did not testify on his own behalf and his conviction followed. The Court of Appeals affirmed (Appendix pp. A1-15).

The courts below, relying upon the record-keeping requirements of 17 C.F.R. 240.17a-4(a) and the required records doctrine enunciated in *Shapiro v. United States*, 335 U.S. 1, 92 L.Ed. 1787, 68 S.Ct. 1375 (1948), dismissed petitioner's argument that the compulsory production of his non-corporate business records violated his Fifth Amendment guarantees.

At no time, either prior or subsequent to his resignation as a broker-dealer or prior or subsequent to indictment was petitioner ever the subject of a regulatory inquiry (Appendix pp. A16, 23).

Reasons for Granting the Writ

The proper application of the "required records" doctrine of *Shapiro*, requires review of the decision below because it poses squarely one of the questions left unanswered in *Shapiro*. Specifically, *in the absence of a regulatory inquiry*, did the Government exceed its constitutional limitations when it compelled the production of "required records", for the purpose of a criminal prosecution. In the instant case, no regulatory inquiry was ever conducted.

This court recently had occasion in *Marchetti v. United States*, 390 U.S. 39, 19 L.Ed. 2d 889, 88 S.Ct. 697 (1968) and *Grosso v. United States*, 390 U.S. 62, 19 L.Ed. 2d 906, 88 S.Ct. 709 (1968) to question both the limitations and the

application of the record-keeping requirements of *Shapiro*. Having called, in these cases, for argument on the relevance of the required records doctrine of *Shapiro*, as it applied to the registration and special tax requirements of 26 U.S.C. Sections 4411, 4412, *Marchetti, supra*, 390 U.S. 42, 19 L.Ed. 894n.1, it was determined that neither *Shapiro* nor the cases upon which it relied were applicable. However, *Marchetti* did state that it was unnecessary "for the present purposes to pursue in detail the question, left unanswered in Shapiro, of what 'limits * * * the Government cannot constitutionally exceed in requiring the keeping of records, * * * '335 U.S. at 32, 92 L.Ed. at 1807' ". The parameters of the doctrine suggested in *Marchetti* were elaborated in *Grosso*,

> "The premises of the doctrine, as it is described in *Shapiro*, are essentially three; *first, the purposes of the United States inquiry must be essentially regulatory;* second, information to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; and, third, the records themselves must have assumed 'public aspects' which render them at least analogous to public documents." *Grosso, supra*, 390 U.S. 67, 19 L. Ed. 2d 912. (emphasis supplied)

Absent the first premise, one response to *Shapiro's* unanswered question should be that it is constitutionally impermissible to compel the production, in a criminal prosecution, of records required to be kept for regulatory purpose when there is no regulatory inquiry.

In the application of the *Shapiro* doctrine, we have found no case in which a criminal prosecution was not preceded by a regulatory inquiry.*

Unlike *Marchetti* and *Grosso*, this case does provide "the purpose to pursue in detail the question, left unanswered in *Shapiro*".

Another basis for review of the decisions below is whether the *Shapiro* doctrine is still viable in view of the decisions of this court since its enunciation.

Apparently, *Shapiro* rested upon four supports: first, a constitutional one, that oral testimony was privileged and writings were not; second, a constitutional one, that the quasi public records of regulated private business were not privileged; third, the implied application of a waiver of the privilege based on the theory of "antecedent choice"; and fourth, the Government's need for information in a regulated business.

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* *Marchetti* v. *U.S.*, 390 U.S. 39, 19 L. Ed. 2d 889; *Grosso* v. *U.S.*, 390 U.S. 62, 19 L. Ed. 2d 906; *Haynes* v. *U.S.*, 390 U.S. 85, 19 L. Ed. 2d 923; *Heligman* v. *U.S.*, 407 F. 2d 448; *U.S.* v. *Webb*, 398 F. 2d 553; *U.S.* v. *Miner*, 398 F. 2d 511; *Schlinsky* v. *U.S.*, 379 F. 2d 735; *Christian* v. *Buchanan*, 373 F. 2d 32; *U.S.* v. *Costello*, 352 F. 2d 848; *U.S.* v. *Uhrik*, 285 F. Supp. 475; *U.S.* v. *Richardson*, 284 F. Supp. 419; *U.S.* v. *Malcouronne*, 283 F. Supp. 87; *U.S.* v. *Covington*, 282 F. Supp. 886; *U.S.* v. *Amer. Rad.* 278 F. Supp. 608; *Stern* v. *Robinson*, 262 F. Supp. 1; *U.S.* v. *Cogan*, 257 F. Supp. 170; *U.S.* v. *Remolis*, 227 F. Supp. 420; *U.S.* v. *Pine Valley Poultry*, 187 F. Supp. 455; *U.S.* v. *Mahler*, 254 F. Supp. 581 and *U.S.* v. *Light*, 394 F. 2d 908.

However, it should be pointed out to the Court that there are cases in which the right of a regulatory agency to secure the required records was unsuccessfully challenged. However, these cases had nothing to do with a criminal prosecution. *S.E.C.* v. *Olsen*, 354 F. 2d 166; *Cooper's Express* v. *I.C.C.*, 330 F. 2d 992; *Local 57, Int'l Union of Operating Engineers* v. *Wirtz*, 326 F. 2d 467.

With respect to the first of these supports, the *Shapiro* court drew a constitutional distinction between written and oral testimony. It held that while oral testimony of a regulated private businessman could not be compelled, written documents were not so protected, 335 U.S. 26, 27, 92 L.Ed. 1803-4.

Subsequently, *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 78, 15 L.Ed. 2d 165, 171, 87 S.Ct. 194 (1965) held that, constitutionally, no distinction was to be drawn between compelled oral testimony and compulsion in writing. Thus, the first of *Shapiro's* supports was compromised.

As to the second of its supports, the assertion by *Shapiro* that the records of the regulated business are public and are, therefore, not protected, must be re-examined in the light of this court's decisions in *Garrity* v. *State of New Jersey*, 385 U.S. 493 17 L.Ed. 2d 562, 87 S.Ct. 616 (1967); *Gardner* v. *Broderick*, 392 U.S. 273, 20 L.Ed. 2d 1082, 88 S.Ct. 1913 (1968); *Uniformed Sanitation Men's Ass'n* v. *Commissioner of Sanitation of New York*, 392 U.S. 280, 20 L.Ed. 2d 1089, 88 S.Ct. 1917 (1968); and *Spevak* v. *Klein*, 385 U.S. 511, 17 L.Ed. 2d 574, 87 S.Ct. 625 (1967). The net effect of these cases is the enunciation by this court that public officials and lawyers may not be compelled to waive their immunity in any criminal or punitive proceeding notwithstanding that the information sought by the Government came into the defendant's possession while acting in his official and public capacity.

It is difficult to comprehend the continued viability of a doctrine which denies the privilege to private businessmen whose records are *deemed* public while granting the privi-

lege to public officials, fiduciaries of the state, and to attorneys licensed and regulated by the state. *Shapiro's* second support rests upon an eroded foundation.

Regarding the third support, it has been suggested that the "required records doctrine" as applied to a regulated private business, is based upon an implied waiver of the privilege, or, "antecedent choice".

In overruling *United States* v. *Kahriger*, 345 U.S. 22, 97 L.Ed. 754, 73 S. Ct. 510 and *Lewis* v. *United States*, 348 U.S. 419, 99 L.Ed. 475, 75 S.Ct. 415, *Marchetti, supra*, 390 U.S. 51-2, 19 L.Ed. 2d 899-900, specifically repudiated the doctrine of "antecedent choice", and the fiction of implied or uninformed waivers of the privilege with respect to a statute whose application was prospective. The doctrine of "antecedent choice" or the inapplicability of the privilege to prospective acts was deemed doubtly deficient in that:

> "First it overlooks the hazards here in incrimination as to past or present acts; and second, it is hinged upon an excessively narrow view of the scope of the constitutional privilege." *Marchetti, supra*, 390 U.S. 52, 19 L.Ed. 2d 900.

While it is true that the *Marchetti* court distinguished its facts from *Shapiro*, see 390 U.S. 57, 19 L.Ed. 2d 902-3, in that the defendant was (1) required to furnish information from records which he did not customarily keep, (2) there was nothing public in the information, and (3) the statute at issue in *Shapiro* was essentially regulatory and not targeted at criminal activity, nonetheless, the reasoning of *Marchetti* in repudiating the theory of "antecedent choice" should be applicable to a re-consideration of *Shapiro* in this, a relevant, case.

Lastly, and as to the fourth support, it should be noted that *Shapiro* could only have been justified upon an extravagant application of the war power. The repudiation of the required records doctrine would not impair in any substantial way the administration or enforcement of any regulatory program and in any case the Fifth Amendment guarantee is not subordinate to the Government's need for information. It is a right which "cannot be abridged". *Miranda* v. *Arizona*, 383 U.S. 436, 479, 16 L.Ed. 2d 694, 726, 86 S.Ct. 1602.

Thus, the constitutional privilege may not be abridged and is not subject to waiver by virtue of "antecedent choice". No constitutional distinction is to be drawn between oral and written testimony and the privilege may be asserted even though the matter sought to be elicited is public.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

BURTON S. COOPER
Attorney for Petitioner

APPENDIX

Decision of United States Court of Appeals, Dated July 22, 1970

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 564-7—September Term, 1969.

(Argued March 18, 1970 Decided July 22, 1970.)

Docket Nos. 33979, 33980, 34004, 34348

UNITED STATES OF AMERICA,

Appellee,

—v.—

PAUL M. KAUFMAN, STEVEN BURNS, ALAN FLOREA, and IRVING GARBER,

Appellants.

Before:

MOORE and FEINBERG, *Circuit Judges;*
BONSAL,* *District Judge.*

Appeal by defendants from judgments of conviction of conspiracy under 18 U.S.C. §371 to violate the anti-fraud provisions of the Securities Act of 1933 (15 U.S.C. §§77 q(a) and 77x) and of substantive violations of said sections entered after a jury trial in the United States District Court for the Southern District of New York, Harold R. Tyler, *J.*

Affirmed.

* Of the Southern District of New York, sitting by designation.

Appendix—Decision of United States Court of Appeals, Dated July 22, 1970

DANIEL J. SULLIVAN, Asst. United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York; William B. Gray, Arthur A. Munisteri, Asst. United States Attorneys, on the brief), *for Appellee.*

JACOB W. FRIEDMAN, New York, N. Y. (Slotnick & Narral, Arnold E. Wallach, New York, N. Y., on the brief), *for Appellant Kaufman.*

GEOFFREY M. KALMUS, New York, N. Y. (Kramer, Lowenstein, Nessen & Kamin, New York, N. Y.; Maurice N. Nessen, Charlotte Fischman, on the brief), *for Appellant Burns.*

JEROME J. LONDIN, New York, N. Y. (Carro, Spanbock & Londin, New York, N. Y., on the brief), *for Appellant Florea.*

BURTON S. COOPER, New York, N. Y. (Shatzkin and Cooper, New York, N. Y.; Edwin L. Smith, on the brief), *for Appellant Garber.*

BONSAL, *District Judge*:

Paul M. Kaufman, Steven Burns, Alan Florea and Irving Garber appeal from judgments of conviction entered against them on July 29, 1969 after a seven-week trial before Judge Tyler and a jury. The indictment (68 Cr. 485) was filed on June 3, 1968 and charged ten defendants in seventeen counts. Five defendants, including the four appellants, went to trial, and twelve counts went to the jury. Count 1, the conspiracy count, charged a conspiracy under 18 U.S.C. §371 to violate the anti-fraud provisions of the Securities Act of 1933 (15 U.S.C. §§77q(a) and 77x).

The eleven substantive counts charged violations of these sections in sending confirmations of stock transactions through the mails. The substantive counts are also described as overt acts in the conspiracy count as acts done pursuant to the alleged conspiracy. Defendant Seigenfeld was acquitted by the jury with respect to the conspiracy count, the only one in which he was charged.

The jury convicted all four appellants under the conspiracy count; Kaufman and Burns on counts 3, 5, 8 and 9, in which they alone were charged; and Kaufman on counts 10, 11, 12, 13, 15, 16 and 17, in which he alone was charged.[1] For the reasons hereinafter stated, we affirm the convictions of each of the appellants.

Statement of Facts

Daniel Kroll, who died in August 1963, was the former president of Donbar Development Corporation (Donbar), which was engaged in the development, building and sale of interracial residential real estate on Long Island and in New Jersey. In January 1963, Kroll lost a proxy fight and was removed from the presidency of Donbar. He owned 82,000 unregistered shares of Donbar, a thinly traded stock selling in the over-the-counter market. A part of his holdings was tied up in a voting trust agreement.

In March 1963, with the assistance of appellant Kaufman's law firm, Kroll obtained a no-action letter from the S.E.C., and later in the month began selling some of his

[1] Defendants were sentenced on July 29, 1969. Kaufman received concurrent nine-month sentences and a $2,000 fine on each count, but execution of the prison term was suspended on all except the first count. Burns received concurrent four-month sentences and a fine of $1,000 on each of the Counts 1, 3, 5, 8 and 9, but execution of the prison term was suspended on all but the first count. Florea received a sentence of four months imprisonment on Count 1, the execution of which was suspended, and a fine of $1,500. Garber received a sentence of three months imprisonment and a fine of $1,000 on Count 1.

available Donbar stock. He encountered difficulties and, in early April, asked for assistance from Mark Binstein, the chief Government witness, who, at the time, maintained an office under the name of National Market Relations, Inc. and employed a Mrs. Eveline Gold on a part-time basis.

Kroll, Binstein and appellant Garber, the owner and operator of an unincorporated over-the-counter securities firm, called Nassau Securities Service, worked out a scheme to sell some 40,000 shares of Kroll's Donbar stock to the public. The scheme involved the paying of cash bribes to salesmen, selective buying to raise and support the market price of the stock, controlled selling so as not to depress the market, and the "squeezing" of short sellers. Appellant Garber was to cause enough Donbar shares to be bought to raise its price from 3-3½, to 4¼-4¾. Appellant Kaufman joined the scheme and brought in S. C. Burns & Co., Inc. and its president, the appellant Steven Burns, to participate in the distribution of the Kroll stock. Cash payments were made to Burns in return for retail sales by his firm, and the payments were escrowed with Kaufman until the Burns' sales had been completed. Kaufman introduced the principals of Harris, Clare & Co., clients of his law firm, to Kroll, and told them they would receive $1.00 cash per share for Kroll stock they sold to customers. Appellant Florea agreed to find brokers to take Donbar stock, and was to receive from Binstein 25¢ in cash for each share so taken. One of these brokers was Seigenfeld, who was acquitted of conspiracy by the jury. Florea was paid in cash by Binstein for his services.

The scheme was carried out during May and June, 1963. The selling of Kroll's available Donbar stock was substantially completed in June, 1963. His shares were sold at prices ranging from $3.00 to $4.00 per share, and thereafter

the price dropped to $1.50 to $2.00 per share. None of the retail purchasers who bought Donbar stock were told of the cash payoffs which were made to salesmen to stimulate their recommendations or that the price of the stock was being rigged while they were buying.

Sufficiency of the Evidence

The jury having found each of the appellants guilty, the evidence must be viewed most favorably to the Government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Bowles*, —— F.2d ——, Docket Nos. 34335-6, 34497 (2d Cir., June 16, 1970), Slip Op. 3311, 3312; *United States* v. *Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969), *cert. denied*, —— U.S. —— (38 U.S.L.W. 3388, April 6, 1970); *United States* v. *Kahaner*, 317 F.2d 459, 467 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963). So viewed, the evidence established an unlawful conspiracy to sell Kroll's Donbar stock through the use of fraudulent and manipulative devices, and the participation of each of the appellants in the conspiracy.

The Government was not required, as appellants contend, to prove that each appellant was involved in all phases of the conspiracy. It was sufficient for the Government to prove that each of them knowingly joined the conspiracy to sell the stock by the use of fraudulent and manipulative devices. *United States* v. *Dardi*, 330 F.2d 316, 327 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964) and cases cited therein. The evidence establishes that Garber aided Binstein and Kroll in setting up the scheme and undertook to supervise the distribution of the Donbar stock. Mrs. Gold and Binstein went to Garber's office to obtain information concerning the market operations. Kaufman, as Binstein and

Kroll's attorney, actively participated in the conspiracy and acted as escrow agent for the cash payments to be made to appellant Burns and received cash from Binstein for that purpose. Burns does not deny that he was to receive payments from Kaufman, but he contends that he did not know of the market rigging aspect—"one prong of the prosecution's two-pronged scheme and conspiracy theory." As stated above, it is immaterial that he may not have known of all of the facets of the conspiracy.

Appellant Florea strenuously contends that he was not a member of the conspiracy, and we consider the evidence as to his participation in more detail.

Florea asserts that there is no evidence of his agreement to effect fraudulent sales of Donbar stock to the public, and that his participation was limited to the "buy" function. Binstein testified that following his first meeting with Kroll, he met with Florea and told him in detail what was contemplated—"that Mr. Kroll would pay $100 per 100 shares for anybody who wanted to participate in the corner, and in the run-up of the stock of Donbar Development Corporation." Binstein testified that,

> "The brokers were told to buy the stock, to put in for clients or trading accounts or anything; but to be put away, not to be sold immediately thereafter, immediately after buying it,"

and that this was in substance what he told Florea.

Binstein testified that Florea visited his office on a number of occasions in May-June, 1963 in connection with the sale of Donbar stock. He testified that Florea "was coming to both collect money for himself and the people he had brought into the Donbar situation, and on a couple of occasions just to come to check [Binstein's daily progress re-

port] . . . to see what buying was done by whom, to make sure he received what he thought he was entitled to." Binstein also testified that Florea had introduced him to Seigenfeld and Dietz Securities. Binstein testified that Florea demanded compensation for his services with respect to Harris Clare and Dietz Securities and that he made a number of cash payments to Florea in connection with Dietz and Harris Clare. Mrs. Gold testified concerning discussions between Florea and Binstein in Binstein's office that,

> "He [Florea] was discussing the amount of money that Binstein owed him for putting certain buying into Donbar although I never actually saw him get paid,"

and that

> "Mr. Florea was claiming compensation for Dietz buying."

Florea testified that he had never heard of Kroll and that he first heard of the Donbar company in 1967, in the U. S. Attorney's office. Florea conceded only that he knew Binstein, as they had been at West Point together. He testified that he never introduced any brokers to Binstein for the purposes of buying or selling Donbar, and he denied receiving any payments from Binstein in connection with Donbar stock. On cross-examination, Florea testified that he occasionally went to Binstein's office, where he saw Binstein and Mrs. Gold. Florea conceded that he could have heard about Donbar in 1963, that he may have told the U. S. Attorney in 1968 that Donbar was represented by Binstein in a public relations capacity, and that he may have heard Kroll's name mentioned in Binstein's office. He also testified that he knew Kaufman and may have seen Burns socially.

The evidence with respect to Florea presented a question of credibility for the finder of fact—whether to believe Binstein or to believe Florea. The jury deliberated two days and considered the evidence with great care, which is demonstrated by the fact that they acquitted Seigenfeld. The evidence establishing that Florea knowingly participated in the conspiracy, knowing both about the fraudulent sale of the Kroll stock to the public as well as the market support operation, was sufficient if the jury believed it—and they did.

Therefore, the evidence establishes that each of the appellants was a member of the conspiracy charged in the first count. Florea contends that the proof fails to show that he knew that the mails would be used in carrying out the conspiracy. However, the proof was sufficient to enable the jury to find that Florea knew that the mails would be used in connection with the distribution of Kroll's Donbar stock. Indeed, as a "registered representative," Florea must have known that the mailing of confirmations was routine in the sale of securities on the over-the-counter market.

Moreover, the proof showed that the confirmations which were the subjects of the overt acts in the conspiracy count and of the substantive counts, were in fact mailed, and that they were mailed in furtherance of the conspiracy. Therefore, the jury having found Kaufman and Burns guilty under the conspiracy count, could find them guilty under the substantive counts as well. The jury was not required to find that Kaufman or Burns knew or should have foreseen that the mails would be used in sending the confirmations listed in the substantive counts. The mails are included in the statute as a ground for Federal jurisdiction. The recent decision of *United States v. Blassingame*, —— F.2d——, Docket No. 33988 (2d Cir., June 1,

1970) overruling *United States v. Houlihan*, 332 F.2d 8 (2d Cir.), *cert. denied*, 379 U.S. 828 (1964) holds that the essence of the crime is the fraudulent scheme itself and that there is no reason why guilt under the statute should hinge upon knowledge that interstate communication of the mails were used. Since Kaufman and Burns were members of the conspiracy and the mailings were overt acts in furtherance of the conpiracy, they were properly found guilty of the subtantive counts by reason of the fraudulent scheme in the which they knowingly participated.

We find, therefore, that the evidence was sufficient to support the jury's conviction of the appellants on all counts.

Government Exhibit 1

Government Exhibit 1, which was received in evidence over objection, was Binstein's daily progress record of the sales of Kroll's Donbar stock and the cash payoffs. The record started on May 16 and continued to June 6, 1963. It contains a number of corrections, side notes, and computations. Appellants Burns, Florea, and Garber urge that Government Exhibit 1 was not a business record and should not have been received in evidence. However, Exhibit 1 was a contemporaneous record kept in the ordinary course of business and was properly received. *United States* v. *Re*, 336 F.2d 306 (2d Cir.), *cert denied*, 379 U.S. 894 (1964). It was a record kept in furtherance of the conspiracy. The items were documented by other brokerage records and corroborated by testimony at the trial. It was clearly a business record kept for a business purpose. Therefore, Government Exhibit 1 was properly admitted, and it was for the jury to determine the weight to be given it.

Government Exhibits 401-406—The Braun Schedules

A more difficult issue is presented by the Braun schedules. Braun was Kroll's accountant. He testified that he prepared these schedules on or immediately after June 11, 1963, following a meeting which he had with Kroll and Binstein, and that the schedules set forth information contained in Government Exhibit 1, which they furnished him, supplemented by information given to him by Kroll and Binstein at the June 11 meeting. There was evidence to indicate that the purpose of these schedules was to serve as an accounting between Kroll and Binstein, and perhaps to be used in a tax fraud in which they alone were engaged. The Braun schedules were not offered by the Government during the Government's direct case. Braun was called as a witness by appellant Florea, apparently in an attempt to contradict Binstein's testimony that Braun had laid out the format of Government Exhibit 1. In cross-examining Braun, the Government offered the Braun schedules to corroborate Binstein's testimony. The Government made effective use of the Braun schedules at the trial and in the course of its summation.

Appellants raised timely objections to the introduction of the Braun schedules—which objections were overruled. On this appeal, they contend that the Braun schedules should have been excluded under the hearsay rule and that the trial judge's failure to do so seriously prejudiced their rights to a fair trial. Appellants assert that the conpiracy had terminated before June 11 and that, therefore, the Braun schedules were not and could not have been prepared in furtherance of the conspiracy, and were therefore mere prejudicial hearsay as to them.

However, the evidence indicates that the conspiracy had not come to an end when the Braun schedules were pre-

pared. The settlement dates on various sales of the stock did not occur until after June 11, and other activities in connection with the distribution of the stock were not finally concluded until June 24, 1963. We note that much of the information contained in the Braun schedules had been previously set forth in Government Exhibit 1. Moreover, even if the Braun schedules were in the nature of an accounting between the primary conspirators, Binstein and Kroll, they also revealed the status of the conspiracy with respect to the appellants. As such, they were properly received as a business record made before the final termination of the conspiracy, setting forth the interests of those involved. *United States* v. *Cohen*, 384 F.2d 699, 701 (2d Cir. 1967); *United States* v. *Hickey*, 360 F.2d 127, 143-44 (7th Cir), *cert. denied*, 385 U.S. 928 (1966); *United States* v. *Re, supra.* The appellants were given adequate opportunity to cross-examine Braun with respect to the schedules and to argue in their summations the weight to be given them by the jury.

Other Contentions

The remaining contentions of the appellants do not require extended discussion.

Appellants Florea, Kaufman, and Garber contend that their cross-examinations of the Government witnesses were unduly restricted by the trial judge, but we find these contentions to be without merit. The trial judge in a lengthy trial must be afforded reasonable discretion to limit cross-examination, and we do not find that the trial judge abused this discretion, *United States* v. *Crasby*, 294 F.2d 928, 944 (2d Cir. 1961), *cert. denied*, 368 U.S. 984 (1962). Appellants complain that they were not allowed to cross-examine Binstein regarding his relationship with a professional

basketball team or whether he had informed his associates in that venture that in return for testifying "he was not going to get a jail sentence." The record reveals that this issue came up out of the hearing of the jury when Seigenfeld's attorney engaged in a lengthy colloquy with the trial judge. At the end of it, the trial judge allowed Seigenfeld's attorney to ask the questions in another form, but he didn't follow it up and neither did the attorneys for the appellants. Nor was it error for the trial judge to preclude inquiry as to Binstein's address. *United States* v. *Persico*, —— F.2d ——, Docket Nos. 34016, 34119, 34235, 34344 (2d Cir., April 15, 1970). In view of the prior relationship between Binstein and appellants, it is hard to see why this was prejudicial, nor did any of the appellants advance sufficient reason to show that it was prejudicial.

Kaufman and Florea contend that the trial judge erred in allowing testimony by Mrs. Gold concerning a prior illegal stock distribution in which Florea and Binstein, and perhaps Kaufman, were involved. However, except for statements made by Mrs. Gold outside of the hearing of the jury, her testimony does not contain any references to prior illegal acts in which the appellants were involved.

Appellant Garber, who appeared *pro se* throughout the trial, contends that he was improperly restrained by the trial judge and that these restraints violated his constitutional right not to testify. Garber's argument is totally without merit. The record shows that from time to time he made statements directly to the court and jury and was properly restrained by the trial judge. Indeed, to the extent that some of his statements might be construed as testimony he may have waived his right to refuse to testify. *See, United States* v. *Lacob*, 416 F.2d 756, 760 (7th Cir. 1969), *cert. denied*, —— U.S. ——, 38 L.W. 3287

(1970); *Redfield* v. *United States*, 315 F.2d 76, 80 (9th Cir.), *cert. denied*, 369 U.S. 803 (1963). During the course of Garber's rambling cross-examination of Binstein, the trial judge remarked, "Don't ask him that kind of thing. Ask him questions having to do with what he has testified to on direct examination by Government counsel. You will have a chance later to tell your side of the story, if you care to." Garber has made no showing that the trial judge's remark was prejudicial error. See, *United States ex rel. Miller* v. *Follette*, 397 F.2d 363, 367 (2d Cir. 1968), *cert. denied*, 393 U.S. 1039 (1969). Throughout the trial, the trial judge sought to protect Garber's constitutional rights, and, indeed, he helped him on various occasions to frame proper questions.

Appellant Kaufman contends that the trial judge erred in striking the testimony of New York Supreme Court Justice Louis B. Heller, his principal character witness. However, Justice Heller was unable to testify as to Kaufman's reputation in the community. He testified only that he knew the appellant and his family, had seen him socially, and that the appellant made "a very good impression" on him. He did not testify as to the community in which Kaufman lived or the circles in which he moved, and hence could not speak with authority as to his reputation in the community. See, *Michelson* v. *United States*, 335 U.S. 469, 478 (1948), 3 Wigmore, Evidence, § 691 at 17 (3d ed. 1940).

Appellant Garber complains that his Fifth Amendment privilege against self incrimination was denied him when the District Court ordered the production of his noncorporate business records pursuant to a Grand Jury subpoena. He had discontinued his business prior to the issuance of the subpoena. As a registered broker-dealer,

Garber was required by S.E.C. regulations to make and keep the records in question so that the same would be available for inspection and examination, and the protection of the Fifth Amendment does not apply. *Shapiro* v. *United States*, 337 U.S. 1, 32 (1948); see, *United States* v. *Pine Valley Poultry Distributors Corp.*, 187 F. Supp. 455, 457 (S.D.N.Y. 1960).

Appellant Burns contends that he was prejudiced by the trial judge's refusal to allow him to go to trial with defendant's Seigenfeld's former lawyer. Seigenfeld's lawyer moved to disqualify his predecessor from representing Burns at the trial or, in the alternative, for a severance of Seigenfeld. The lawyer opposed the motion and later sought a writ of mandamus directing Judge Tyler to permit him to continue as Burns' attorney—which was denied by the Court of Appeals (*Burns* v. *Tyler*, Docket No. 33376, March 21, 1969). The trial judge was well within his discretion in directing Burns to obtain another lawyer in view of the possible conflict of interest between Burns and Seigenfeld. See, *Consolidated Theatres* v. *Warner Bros. Circuit Management Corp.*, 216 F.2d 920 (2d Cir. 1954); *T. C. Theater Corp.* v. *Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953). Indeed, the wisdom of this exercise of discretion was demonstrated by the acquittal of Seigenfeld and the conviction of Burns.

Burns also contends that since he was acting as principal and not as broker in the sale of the Donbar stock, he had no duty to disclose to customers the cash payments which he was receiving. (See, *United States* v. *Bilotti*, 380 F.2d 649, 657 n. 17 (2d Cir.), *cert. denied*, 389 U.S. 944 (1967); *United States* v. *Haydin*, 398 F.2d 944, 949 (2d Cir.), *cert. denied*, 393 U.S. 961 (1968).) However, the receipt of these cash payments and the failure to disclose

their receipt to customers was circumstantial evidence to be considered by the jury in determining wheather or not Burns was a member of the conspiracy to sell the Donbar stock through the use of manipulative and unlawful devices.

Garber claims that his participation in the conspiracy terminated on June 3, 1963, on the ground that after that date he no longer bought Donbar stock but, on the contrary, was selling it—which he says is "evidence that the conspiracy had failed. *See, Fishwick* v. *United States*, 329 U.S. 211, 91 L.Ed. 196, 200." He therefore contends that the statute of limitations had run as to him. However, there is no evidence from which the jury could have concluded that Garber affirmatively withdrew from the conspiracy on or before June 3, and he therefore remained tied into the conspiracy with respect to overt acts committed by other members of the conspiracy after that date.[2] Moreover, the evidence showed that Garber's activities in supervising the distribution of the Donbar stock continued after June 3.

The remaining allegations of error require no comment, and the conviction of the appellants is affirmed.

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2 The trial judge had originally charged the jury that they must find at least one overt act was committed prior to June 3. After this was brought to his attention, he corrected his charge and instructed the jury that "at least one of the overt acts [was] allegedly committed on or after June 3, 1963." The trial judge told the jury that June 3, 1963 was the cutoff date for the statute of limitations and that it was for this reason that the jury must find that at least one of the overt acts took place on or after that date.

Order and Opinion of the Honorable Irving Ben Cooper, Dated October 25, 1968

Defendant's several motions presented pro se are for dismissal of the indictment, severance and change of venue.

Defendant moves to dismiss alleging violations of his Fifth Amendment privilege against self-incrimination and the provisions of 15 U.S.C. § 77v(c) which automatically confers immunity from prosecution where privileged evidence is produced before the Securities Exchange Commission after a proper claim of self-incrimination. Motion denied on both grounds. We note that the records herein involved were subpoenaed by a Grand Jury and not by the Commission.

The Government avers that of the records Garber produced before the Grand Jury pursuant to a *subpoena duces tecum*, the only papers examined or used were those which brokers-dealers are required to preserve and make available for inspection and examination by the S.E.C. for not less than six years under 17 C.F.R., 240.17a-4(a), and that such records so examined were required thereunder to be kept by him at the time he produced them. The maintenance requisite is for the protection of the public and of investors. 15 U.S.C. § 78q(a). The constitutionality of this imperative is beyond doubt. *Shapiro* v. *United States*, 335 U.S. 1, 32 (1948); *SEC* v. *Olsen*, 354 F.2d 166 (2d Cir. 1965).

The records here are limited in number and scope, and we hold that they are not private papers or records but assume the characteristics of "public or quasi-public documents." See *Shapiro* v. *United States*, 335 U.S. 1, 32 (1948); *SEC* v. *Olsen*, 354 F.2d 166 (2d Cir. 1965); *United States* v. *Pine Valley Poultry Distributors Corp.*, 187 F. Supp. 455 (1960). Defendant had no contsitional priv-

ilege to relinquish with respect to such "required records." *United States* v. *Pine Valley Poultry Distributors Corp.*, *supra* at 457.

We also deny the motion for dismissal on grounds of vagueness. The indictment sets forth "a plain, concise and definite written statement of the essential facts constituting the offense charged." Rule 7(c), F. R. Crim. P. Each element of the offense is particularized and charged. *United States* v. *Gutenau*, 189 F. Supp. 265, 270 (S.D.N.Y.1960); *United States Greenbery*, 30 F.R.D. 164, 170 (S.D.N.Y. 1962).

In support of a further motion to dismiss, defendant contends that the Grand jury which returned the indictment was improperly selected in that the jury system operates to exclude persons on the basis of race, creed or color. Similar challenges in this district were recently rejected after very extensive examination of the issue. *United States* v. *Leonetti*, 65 Cr. 649, Opinion No. 34866 (June 10, 1968). Motion denied.

Pursuant to Rule 14, F. R. Crim. P., defendant alleging prejudice moves for a severance and separate trial. His position is that he will suffer severe economic harm from a long trial and that the alleged bad character of his co-defendants will prejudice the presentation of his individual defense. These allegations are wholly speculative at this time. Motion denied without prejudice to renewal at or near the time of trial. See *United States* v. *Projansky*, 67 Cr. 729, Opinion No. 34700 (S.D.N.Y., April 29, 1968).

Defendant's final motion is for a change of venue. Rule 21(a), F.R. Crim. P., provides for a change of venue "if the court is satisfied that there exists in the district where

the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial. . . ." Defendant's unsupported allegation that "the newspapers in this district already tried the case" fails to show a "reasonable likelihood that prejudicial news prior to trial will prevent a fair trial." *Sheppard* v. *Maxwell*, 384 U.S. 333, 363 (1966). Motion denied.

This shall be considered an order; settlement hereof is unnecessary.

So Ordered:
New York, N. Y.
October 25, 1968

s/ Irving Ben Cooper
U. S. D. J.

United States Constitution

AMENDMENT [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes Involved

"TITLE 18 UNITED STATES CODE"

§ 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Statutes Involved

Title 17, Code of Federal Regulations:

§ 240.17a-4:

"(a) Every member, broker, and dealer subject to § 240.17a-3 shall preserve for a period of not less than 6 years, the first 2 years in an easily accessible place, all records required to be made pursuant to § 240.17a-3(a)(1), (2), (3), and (5)."

* * * * *

"(g) If a person who has been subject to 240.17a-3 ceases to transact a business in securities directly with others than members of a national securities exchange, or ceases to transact a business in securities through the medium of a member of a national securities exchange, or ceases to be registered pursuant to section 15 of the Securities Exchange Act of 1934 as amended (48 Stat. 895, 49 Stat. 1377; 15 U.S.C. 780), such person shall, for the remainder of the periods of time specified in this section, continue to preserve the records which he theretofore preserved pursuant to this section."

TITLE 15, U.S.C.:

§ 77q. FRAUDULENT INTERSTATE TRANSACTIONS

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Title 15 U.S.C.:

§ 77x. PENALTIES

Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000.00 or imprisoned not more than five years, or both. May 27, 1933, c38, Title I, § 24, 48 Stat. 87.

Appellant's Notice of Motion and Supporting Affidavit, Dated August 15, 1968

[Caption Omitted]

Notice of Motions

To: U.S. Attorney Southern District:

Please take notice that upon the affidavit and motions herewith, on Aug. 13th at 10:30 a.m., I will move in the U. S. District Court for the Southern District New York for the dismissal of the indictment, and or a severence of trial to another district.

Irving Garber, defendant
s/ Irving Garber,

Note of Issue

1. I move for dismissal of the above indictment on the basis that it was handed down in direct violations of my constitutional rights against self-incrimination. This right is clearly re-stated in the S.E.C. Act of 1933 Sect. 22 para: "C" and again repeated in the S.E.C. Act of 1934 Sect. 21 para: "D". Inasmuch as this court ruled that my records be seized over my protest, as the record shows, these rights of protection against self-incrimination apply, beyond any doubt. Should this court fail to recognize this privilege, I respectfully request permission to take this issue to the U. S. Court of Appeals.

2. I further move for dismissal of this indictment because it is worded in a vague and general manner. Nowhere in the indictment, can I find *one* specific clearly supported charges.

3. I move for dismissal of this indictment because the grand jury was improperly selected on the basis of race creed and color. I don't recall one colored person sitting.

L.

Appellant's Notice of Motion and Supporting Affidavit, Dated August 15, 1968

4. I move for a severance of trial, and change of Venue. Since I've never met a majority of the other defendants and never discussed the Donbar stock in question, (except in a trade over the phone,) I feel that I shouldn't be exposed to the prejudices that are shown me. Already one attorney mentioned to me that I was in with a bad crowd. The record shows consistent securities violations against the other defendants and I seem to recall a criminal indictment against one. It might be noted that in my approximate 7 years as a broker, I've never been the subject of any criminal stock investigation. For this primary reason of prejudice, I ask for a severance of trial, Secondly I ask for a severance because I am the sole owner of a small retail store (Children's Shoes), and I cannot be away from the store at all. I urge this court to take this matter quite seriously since losing my store would mean losing my life's savings, and my family will suffer severely. It isn't easy for a 48 yr. old indicted citizen to get a job. I also ask for a change of Venue since the newspapers in this district already tried the case, and as a matter of fact, originally announced my indictment, before I received notice from the U.S. Attorney. In short, I cannot attend a two month trial, under my circumstances, and feel that a severance of trial and change of Venue would be the only fair thing in order to eliminate the prejudice and hardship which I have mentioned.

s/ IRVING GARBER,

[JURAT OMITTED]

Affidavit of Lawrence W. Newman, Assistant United States Attorney, Dated September 25, 1968

[Caption Omitted]

Lawrence W. Newman, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, and as such, am in charge of the above-captioned matter and am familiar with the facts and prior proceedings therein.

2. This affidavit is submitted in opposition to motions by the defendants Kaufman, Burns, Florea, Garber, Seigenfeld, Summers and Winslow directed toward the indictment in this case. These motions seek various forms of relief which may be categorized generally as the following:

(1) Motions relating to the Grand Jury—relating to its selection, the alleged presence before it of an unauthorized person, testimony given before it and records obtained by it;

(2) Motions to dismiss the indictment, on grounds of insufficient evidence before the Grand Jury, the statute of limitations, unconstitutionality, illegality, vagueness of the indictment, etc.;

(3) Motions for severance and a change of venue;

(4) Motions for discovery and inspection;

(5) Motions for bills of particulars; and

(6) Motion for a speedy trial.

* * * * * *

[Paragraphs 3 through 13 omitted]

14. The defendant Garber, as part of his *pro se* motion, contends, in paragraph 1 of his papers, that his records were "seized" over his protest by order of this Court and that the indictment should therefore be dismissed. The

were "seized" over his protest by order of this Court and that the indictment should therefore be dismissed. The facts behind this statement are as follows: On August 7, 1967, Garber appeared before the Grand Jury pursuant to a subpoena duces tecum served on him by a Deputy United States Marshal calling for the production before the Grand Jury of

> "All records of receipts, purchases and deliveries of Donbar Development Corporation stock by Nassau Securities Service during the period April 1, through July 31, 1963."

15. The records of the Securities and Exchange Commission reveal that Irving Garber was registered as a broker-dealer with the Securities and Exchange Commission effective March 28, 1959, doing business as Nassau Securities Service, a sole proprietorship; this registration remained effective until September 1, 1965.

16. On August 7, 1967, Mr. Garber appeared before the Grand Jury at the time and place set forth in the subpoena. Immediately prior to Mr. Garber's appearance before the Grand Jury, I spoke to Mr. Garber in the hallway outside the Grand Jury room in the presence of an investigator for the Securities and Exchange Commission, George Seifried. I advised Mr. Garber that the subpoena had been served on him as part of an investigation into transactions in the stock of Donbar Development Corporation in the spring and summer of 1963. I told Mr. Garber that the investigation was to determine whether any violations of the federal criminal laws relating to conspiracy, fraud or manipulation had occurred in connection with transactions in Donbar stock, and that if the Grand Jury determined that such violations had

occurred it would also have to determine who was responsible for such violations and whether they should be named as defendants in an indictment. I told Mr. Garber that I was not sure what his involvement was in such transactions in Donbar stock because the investigation was still in progress.

17. Mr. Garber told me and Mr. Seifried that he had brought with him the records called for in the subpoena, but that he would not hand the records over because he wanted to claim his Fifth Amendment privilege against self-incrimination with respect to them unless he was granted "immunity". I told Mr. Garber that it was the Government's view that he had no such privilege with respect to records of his brokerage firm, but that the subpoena could be adjourned while he consulted with a lawyer as to his rights and obligations in this matter. Mr. Garber said that he wanted to appear before the Grand Jury and claim his privilege. I told Mr. Garber that in the Government's opinion he could be compelled by the Court to hand over the records, but that the Grand Jury's schedule did not permit it to seek a ruling from the Court on that day. Then Mr. Seifried served another subpoena on Mr. Garber identical to the one first served on him except that it called for his appearance one week later at 10:00 A.M. on August 15, 1967. Mr. Garber then appeared before the Grand Jury on the morning of August 15, 1967. The subpoena first served on him was adjourned by the foreman of the Grand Jury until 10:00 A.M. on August 15, 1967.

18. On August 15, 1967, Mr. Garber again refused to turn over the records of his firm requested in the Grand Jury subpoena. He was then taken before the Honorable John M. Cannella, who ordered Mr. Garber to turn over the records called for in the subpoena. Mr. Garber then

turned over to the Grand Jury the records called for in the subpoenas. These records, which are required to be kept under the rules of the Securities and Exchange Commission, are not protected by the Fifth Amendment privilege for the reasons set forth in the Government's memorandum of law. The Grand Jury minutes and exhibits relating to Mr. Garber's production of the records are available to the Court for its inspection *in camera*.

19. Immediately after Garber produced a collection of documents before the Grand Jury, I made a preliminary examination of the nature of those records and segregated and sealed in separate envelopes all documents which could be considered as not having been required to be retained for more than three years under 17 C.F.R. 240, 17a-4(b) (1). These documents included confirmations and a summary prepared by Garber. Only the documents remaining—pages from blotters, stock records and customer records—of the type described in 17 C.F.R. 240, 17a-4(1), (3) and (5) (see above) were examined as to their content or used in any way in this investigation. The sealing of the other documents was done only a few minutes after they were produced before the Grand Jury; these documents were never examined by anyone as to their content and have remained sealed to this day.

[Paragraphs 20 through 22 omitted]

WHEREFORE, upon the facts and for the reasons set forth herein and in the accompanying memorandum of law, it is respectfully requested that defendants' motions, except as consented to herein and in said memorandum of law, be in all respects denied.

s/ LAWRENCE W. NEWMAN,
LAWRENCE W. NEWMAN,
Assistant United States Attorney

[Jurat omitted]

Extract of Trial Record
Pages 976-977

Mr. Garber: If your Honor please, I did not want to mention this in front of the jury because I prefer to clear things with you first.

For the record, your Honor, as you well know, I have a standing objection to this entire trial because —it is in the Court of Appeals—because my records were, according to me and according to the statutes, illegally seized.

How all this material produced henceforth, including Mr. Singer's evidence, I claim have been pinpointed through the seizure illegally of my records.

I have a standing objection to any government production of any material pertaining to my name inasmuch as I was not offered immunity and it is illegally presented.

The Court: I understand you. Let's have lunch.

"Extract of Record—Pages 1233-1237"

The Court: All right. Let me indicate on the record that these are grand jury Exhibit Nos. 1 and 2 before the August grand jury of 1967 or some special grand jury which happened to be sitting that month. I think that's a fair enough designation. We will deem them both part of that record for purposes of this trial.

Now, Mr. Garber, let's go back. You have pointed out to me Section 22 of the 1933 Act. As Mr. Sullivan points out, and without undue elaboration, it really has nothing to do with the present posture of the problem. That has to do with Commission proceedings and this is not the Commission. This is an entirely different body, the Court. However, I understand you to be saying, in effect, and correct me if I am wrong, that you feel the production of these records through those grand jury subpoenas which I have just identified, which was served upon you—there is no doubt about that? You don't argue they were not served?

Defendant Garber: Oh, no.

The Court: —were an unfair intrusion upon your private business affairs and, more particularly, they deprived you of your rights against self-incrimination; is that a fair statement of your position?

Defendant Garber: Very fair.

The Court: Now the Government, on the other hand, I think is goingt to argue some of these cases in the Circuit. Is that it?

Mr. Sullivan: Some of these we have cited in our brief, your Honor.

The Court: I only had time to skim your brief when we had these other problems raised before us.

In other words, you rargument is that since the law requires that these be kept as quasi public records or public

records, that even though Irving Garber was doing business as a sole proprietorship, or however you want to style it, and no as a corporation he has no right to raise this argument?

Mr. Sullivan: That's correct.

Defendant Garber: Your Honor, I might point out, and, as you know, this is my most ticklish subject because you know my feelings about it, especially in a matter such as this when, as you know, there are two sides to every transaction—why then would they take a person's own records and try to convince him on those when there is another side? They could have gone to the other side if they thought they had something.

The Court: To some extent they have, from what I have seen.

Defendant Garber: Then this is superfluous by your own statement.

The Court: I understand you, but I must say, with all due respect, that the Government is right, Mr. Garber. Once you went into business you did, my understanding of the law is and always has been, that certain records such as these were required to be kept and under our statutes, the Federal statutes that are dealing with the securities industry, they become, as I styled them a moment ago, quasi public or public records.

Defendant Garber: May I add, and this is with no disrespect, that I had a meeting with the SEC before I went into this business. They did not inform me that I lost my rights of citizenship when I became a broker; furthermore, when I left, I gave the Government 30 days—this thing was under investigation at the time—to suspend my resignation; having not suspended my resignation, my 30-day—revocation, rather, of my broker's license, they forfeited

their right to treat me as a broker, and I then became a civilian.

For example, you were in the Service and you are given an honorable discharge; they can't call you back six months later and say, "I'm sorry but we are going to courtmartial you; we made a mistake."

Furthermore, I have documentary evidence that my report was scatheless from the NASD during this very period. They gave me a clean bill of health.

Your Honor, I want to say to you this in the absence of the Jury:

I intend to set a precedent in this matter as I did in another matter with the SEC while I was a broker, before the United States Court of Appeals. I set a precedent. I have some very strong feelings about the brokerage business. My record is spotless. It was spotless the day I left.

There is another reason for all this which I will bring out. It is a little bit between me and Mr. Morgenthau. Mr. Morgenthau could be a very embarrased man when you hear it.

The Court: I understand, and I cannot say I am without sympathy to the reasons you feel the way you do. However, I believe that the Government is correct on the law and therefore it is my duty to say so, and I say so here and now. I do not think that your resistance to the offer of these documents is well taken.

An exception to you and all your colleagues, counsel, who have joined in on this motion of yours.

LIBRARY

No. [illegible]

[illegible]

[illegible]

Irving Kessel, Petitioner,

v.

United States of America.

Allan Block, Petitioner,

v.

United States of America.

Paul M. Kaufman, Petitioner,

v.

United States of America.

Steven S. Burns, Petitioner,

v.

United States of America.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION

[illegible]
Solicitor General,

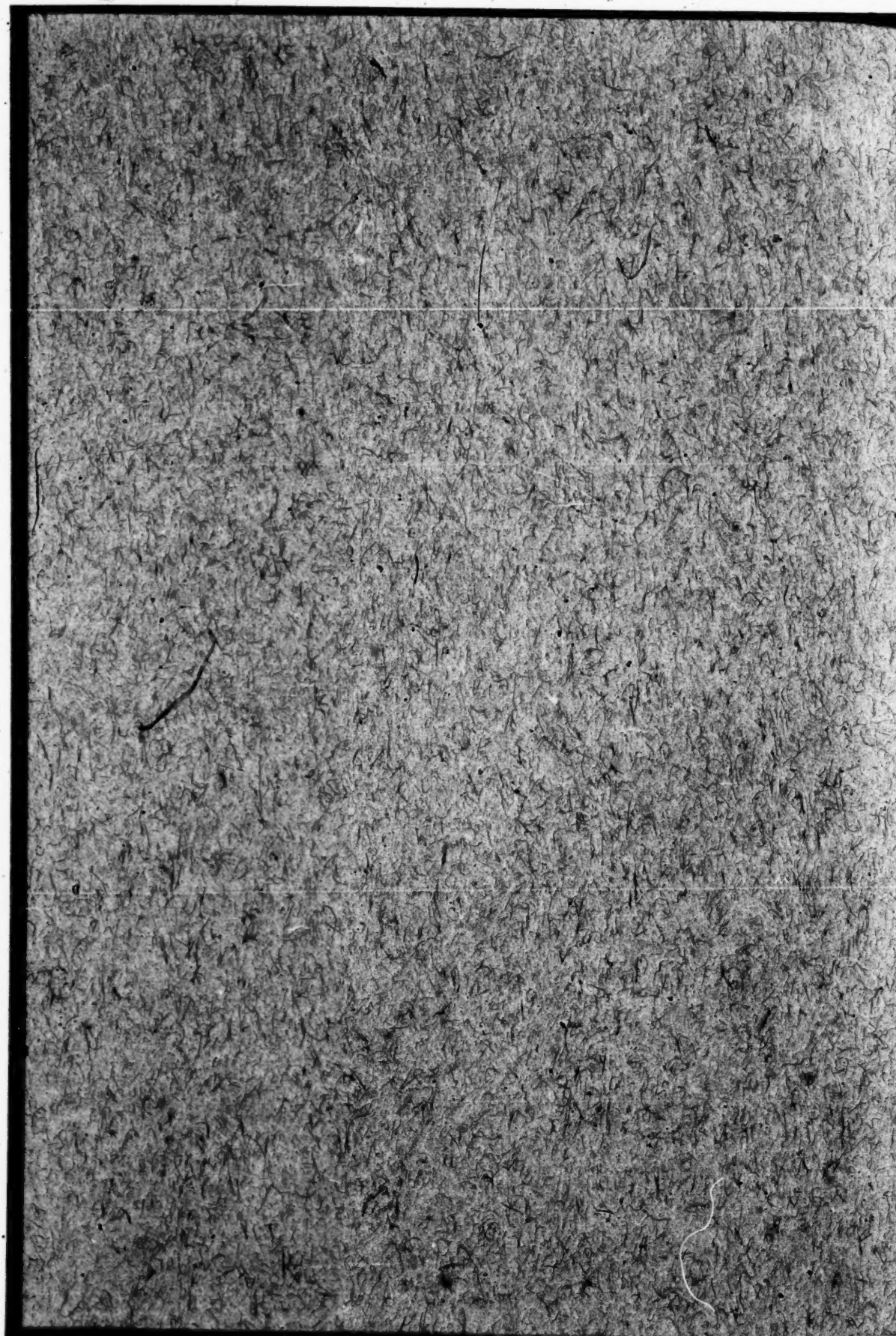
[illegible]
Assistant Attorney General,

[illegible]
Special Assistant to the Attorney General,

[illegible]
Attorneys,

Department of Justice,
Washington, D. C.

SUPREME COURT, U.S.
FILED
NOV 3 1958
J. WARREN TAYLOR, CLERK



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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 567

IRVING GARBER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 574

ALAN FLOREA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 576

PAUL M. KAUFMAN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 719

STEVEN C. BURNS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Garber Pet., No. 567, App. A1–A15) is reported at 429 F. 2d 240.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1970. Mr. Justice Harlan in the case of Burns extended the time for filing a petition for a writ of certiorari to September 19, 1970, and on that date his petition was filed. The other petitioners filed their petitions on August 20, 1970 (Garber) and August 21, 1970 (Florea and Kaufman). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The following questions are presented in these four petitions by the defendants at a common trial for conspiracy and securities fraud:

1. Whether the evidence supports the verdict (Florea, Kaufman, Burns).

2. Whether certain evidentiary rulings, including limitations on cross-examination were proper (Florea, Kaufman, Burns).

3. Whether certain documentary evidence, including the required business records of a broker, a daily account of stock distribution, and analyses of the daily account made by an accountant, was properly received (Garber, Florea, Burns).

4. Whether the court's instructions in certain particulars were accurate and fair (Florea, Kaufman).

5. Whether it was proper, at the request of a co-defendant, months before trial, to disqualify Burns' retained counsel, whose firm had previously represented a co-defendant in the criminal matter that was the subject of the instant trial (Burns).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, each petitioner was convicted of conspiracy to violate the anti-fraud provisions of the Securities Act of 1933, and petitioners Kaufman and Burns were also convicted of the substantive offenses of sending confirmations of fraudulent stock transactions through the mail, in violation of 18 U.S.C. 371 and 15 U.S.C. 77q(a) and 77x.[1] On July 29, 1969, petitioner Garber was sentenced to three months' imprisonment and fined $1,000; petitioner Florea was given a suspended sentence of four months, placed on probation for two years and fined $1,500; petitioner Kaufman was sentenced to nine months' imprisonment on each of twelve counts (to be served concurrently, with the imprisonment on all but the first count suspended), placed on probation for two years after release from imprisonment, and fined $2,000 on each count, for a total of $24,000; and petitioner Burns was sentenced to four months'

[1] A fifth defendant (Seigenfeld) who stood trial with petitioners, was acquitted. Initially, ten defendants were named in the indictment, but some pleaded guilty before trial or were otherwise granted a severance from the five tried in the present case. Of the seventeen counts, twelve went to the jury.

imprisonment on each of five counts (to be served concurrently, with the imprisonment on all but the first count suspended), placed on probation for two years after release from imprisonment, and fined $1,000 on each count for a total of $5,000.

The evidence showed that in May 1963, Daniel Kroll, a past president of Donbar Development Corporation, owned a large block of unregistered stock in that corporation which he was unable to sell at the then current over-the-counter market price (App. 105–106).[2] He decided to deposit a significant portion of his stock with one broker (Lee) with instructions to sell at $4 per share or higher, approximately $1 above the then current market price, and to use other brokers to create a market for the shares at the same price (App. 116–117). Kroll's method of creating a market for Donbar shares included support for the price, so that it would not drop below $3.50 per share. He thereafter had various nominees of his, acting through petitioner Garber's brokerage firm (Nassau Securities), buy Donbar stock at prices over $3.50 (App. 127–128).

Kroll furnished the money for these support purchases and promised to protect Garber and his nominees against loss (App. 117–118, 127, 129, 587). Having thus raised the market price by approximately $1 per share, Kroll agreed to pay $1 per share to other brokers, such as petitioner Burns, to buy shares from

[2] "App." refers to the eleven volume appendix of petitioners Kaufman and Burns of the proceedings before the district court. We are lodging this appendix with the Clerk of this Court.

the supply he owned (App. 110, 241, 251–252, 1748, 1939, 1983). The brokers would buy the shares either for their own accounts (App. 4094, 4147), hoping for a profit in addition to the $1 per share bonus for buying, or for the accounts of customers whom they could persuade to take the stock. The customers were not told of the temporary price support nor of the extra cash compensation that Kroll was furnishing (*e.g.* App. 1736, 1755, 1839, 1950, 1962, 1971–1972).

Petitioner Florea was a registered representative with a brokerage company (Richter); his function in the Donbar enterprise was as a "finder" of brokers, whom he would introduce to Kroll and Kroll's associate, one Binstein,[3] with a view to their participation in the contemplated "corner" of Donbar stock (App. 130–133). For this service, Florea demanded and received compensation based on Binstein's record (Govt. Ex. 1) of the number of Donbar shares these participating brokers bought (App. 155–156, 164, 192–193, 481, 483, 487–488, 568, 1557–1561).

Important to the success of the selling of Kroll's block of shares was a time limitation on the reselling of Donbar shares imposed on the participating brokers to prevent the market from collapsing (App. 150). The enforcement of this restriction was the responsibility of petitioner Garber (App. 584, 587, 1553), but some prompt reselling nevertheless ensued. As a result,

[3] Binstein, a government witness at trial, was not indicted for his part in the Donbar distribution, but was awaiting sentence on another stock fraud charge to which he had pleaded guilty (App. 103).

Kroll went to his attorney, petitioner Kaufman, for help (App. 245). Kaufman introduced Kroll to broker clients of his law firm, such as petitioner Burns, who were agreeable to participation in the disposition of the Donbar stock (App. 245–246, 1745). Some of these brokers preferred to receive their secret $1 per share compensation direct from Kroll or Binstein (App. 1834), but petitioner Burns had petitioner Kaufman act as the escrow agent for the multi-thousand dollar payments paid to Burns for his work (App. 247–248, 735–737, 858–859, 1578).

In buying stock for the accounts of their customers in Donbar Development, the brokers sent confirmations of the purchases by mail (*e.g.* App. 1854–1855, 1859, 1861, 1951, 1962, 1972, 1992).

The activity in Donbar stock lasted approximately three weeks, ending the first week of June 1963 (App. 438, 563). By the third week of June, the price of the Donbar shares had fallen from $4.50 a share to a price range of $1.50 to $2.00 (App. 278, 890).

ARGUMENT

1. Florea, Kaufman, and Burns each assert that, as to himself, the evidence was insufficient to support the verdict of guilty.

a. Florea:

Petitioner Florea contends that if he was guilty of anything, it was only of finding brokers who would

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[1] Kaufman sought compensation from Kroll by boosting the legal fee he charged Kroll for his work in an unrelated matter (App. 280–285).

[2] Kroll died in August 1963 (App. 285).

3225, 3237). Floren knew that brokers customarily mailed confirmations of purchases to their customers and would do so in connection with the Dunbar scheme. *Pereira* v. *United States*, 347 U.S. 1, 8; *United States* v. *Brickey*, 426 F. 2d 680, 684 (C.A. 8).

c. Kaufman:

Petitioner Kaufman contends (Kaufman Pet. 4–13) that the evidence was insufficient to convict him of either the conspiracy charge or the substantive counts of aiding and abetting the stock brokers in perpetrating frauds on their customers. As stated above (*supra*, pp. 5–6), however, when petitioner Garber proved unable to control his fellow brokers, Kroll sought and obtained the help of the attorney, Kaufman, who was experienced in the securities regulation field and had many broker-dealer clients. (App. 1436, 2879, 3276). Binstein testified as to Kaufman's efforts to introduce Kroll to various brokers and as to Kaufman's role as escrow agent for Burns' secret payments. Other brokers also testified that they first heard of the plan for disposing of Dunbar stock from Kaufman and that he also offered to act as escrow agent for these secret payments from Kroll (App. 1394, 1713, 1718, 1768, 1831). From these facts, the jury was warranted in finding that Kaufman both participated in the conspiracy and aided and abetted Kroll and others.

Kaufman also argues (Pet. 16) that his convictions under the conspiracy and substantive counts should be mutually exclusive. It is, however, settled that aiding and abetting and conspiracy involve distinct elements and are distinct offenses. *Pereira* v. *United States*, 347 U.S. 1, 11–12.

Kaufman also contends (Kaufman Pet. 13–14) that the mailing of confirmation slips to customers who purchased Donbar stock did not constitute a use of the mails in furtherance of a fraudulent scheme, an element required for conviction under the instructions given to the jury.

Confirmation slips, however, are not simply courtesy notices. Before stock is delivered to a buyer, the confirmation notice must be sent out to enable the buyer to settle his account by the date indicated. Thus, confirmations are in effect bills calling for payments of the purchase prices indicated on the slips (see App. 1265–1266, 1311–1312, 1320, 1563, 2118, 3049, 4480). The jury was clearly warranted in finding that use of the mails to send out the confirmations was in furtherance of the conspiracy.

c. Burns:

Burns, a stock broker, claims that he had no knowledge of the market rigging of the price of the Donbar shares (Burns Pet. 6) and that the evidence that he sold the shares without disclosing the receipt of the secret payments of $1 per share was insufficient (Burns Pet. 7, 10, 11). Binstein testified, however, that after Kaufman had agreed to find brokers for the Donbar distribution, Kaufman named Burns as a broker with whom he had a "close relationship" and who could be depended upon to sell all the remaining Donbar shares (App. 245). Petitioner Burns later confirmed this claim of "retailing power" in a conversation with Binstein, when Binstein called on Burns to confirm Kaufman's arrangements (App.

247). Burns insisted at this time that his bonus money be paid in advance to Kaufman (App. 247), and Binstein thereafter on one occasion gave Kaufman $4,000 for Burns (App. 248). Halperin, an assistant of Binstein, also delivered an envelope with cash to Kaufman (App. 1064). This evidence of Burns' guilt was augmented by an accidental meeting he had with Binstein in 1967 while the Donbar distribution was under investigation during which Burns told Binstein that he had nothing to worry about and warned: "If you know what's good for you, just keep your mouth shut" (App. 275–276). The evidence thus clearly supported the finding of Burns' complicity both as to the conspiracy and substantive offenses.[7]

2. Petitioners Florea, Kaufman and Burns also contend that certain evidentiary rulings, including limitations on cross-examination were prejudicial as to them.

a. Florea:

Florea asserts (Florea Pet. 17–27) that he should have been permitted to interrogate Binstein and co-defendant Seigenfeld more fully. It is claimed that restrictions by the court prevented any inquiry as to why Binstein was not indicted in the instant case and whether he hoped to avoid punishment on another stock fraud charge, and precluded full examination of Binstein's current business interest in a profes-

[7] The jury was instructed that this statement was to be considered solely as evidence against Burns (App. 277).

[8] It was, of course, not necessary to prove that petitioner was a member of the conspiracy from its inception. *Blumenthal* v. *United States*, 332 U.S. 539, 557.

sional basketball league franchise (Florea Pet. 18–21). Contrary to this contention, these matters were either brought out on cross-examination or concerned matters outside the issues at trial.[10] Binstein, for example, testified that his cooperation with the government was not based on any promise that he would not be indicted for the Donbar transactions (App. 682); he stated that he hoped he would not be sentenced to imprisonment or would receive a suspended sentence on an unrelated stock fraud charge to which he had pleaded guilty (App. 103, 397–398, 473). Binstein also testified that he had told league officials of his guilty plea to a felony (the stock fraud) and had been informed that he was not as a result barred by league rules from holding an interest in a franchise (App. 472). The defense had ample opportunity to show Binstein's past lies and evasions, his profit from the Donbar distribution, and to question other witnesses as to his reputation of being a "born cheat" (App. 344, 350, 430, 432, 444; 404, 757; 1558).

Seigenfeld's counsel at trial asked that his client and one Richter, both officers of a stock exchange firm for which Florea had worked, not be cross-examined as to administrative sanctions which had been imposed on them by stock exchange authorities, unless government counsel or counsel for other defendants first explained to the court at a side bar conference

[10] The profitability of a public offering of stock in the basketball franchise, completed after the verdicts were returned in the instant case (Florea Pet. 20–21), could not have been known weeks earlier when Binstein testified and at a time when the registration statement for such offering had not been filed.

why such questions would be relevant (App. 3807). Florea's claim that this restriction was error (Florea, Pet. 23-27) is without merit as no counsel made an effort to inquire as to these administrative sanctions and the court had not forbidden such inquiries.

b. Kaufman:

The trial court sustained an objection to a question asking Binstein where he lived and where his children lived (App. 308-309). Petitioner Kaufman urges this as error. However, *Smith v. Illinois*, 390 U.S. 129, upon which he relies, requires reversal only where the lack of name and address of a witness denies a defendant an opportunity to cross-examine *effectively*. Where a defendant is not hampered in his cross-examination, no confrontation right is infringed. *United States v. Lawter*, 413 F. 2d 622, 627 (C.A. 7), certiorari denied, 396 U.S. 1046; *United States v. Lee*, 413 F. 2d 910, 915, (C.A. 7), certiorari denied, 396 U.S. 1022.

In the present case, Binstein testified as to his marriage and number of children and that he lived in New Jersey. He also testified as to his current occupation (App. 308-311). The court offered to hold a sidebar conference if counsel had any reason to want specific information as to the place of residence of Binstein; but no counsel sought such a conference (App. 309). At all events, counsel had no trouble "identifying the witness with his environment" (Kaufman Pet. 17). He was shown to be a person of some prominence in professional basketball circles and counsel for a co-defendant was able to identify him

as a participant in a marital dispute in New Jersey (App. 608–614).

Kaufman also urges that it was error to allow testimony showing that Florea had participated in another crime not covered by the indictment and to strike character evidence offered in Kaufman's behalf (Kaufman Pet. 19–20, 21–23). The witness, Mrs. Gold, did not implicate Florea in another crime as petitioner Kaufman asserts. She stated that as part of the Donbar distribution, Florea sought compensation from Binstein for the buying activities of a broker, Dietz[11] (App. 1561). Since this dealing with Dietz was part of the Donbar transaction and since Florea does not presently complain as to this evidence, petitioner Kaufman has no cause for complaint.

As to the other point, a New York jurist (Judge Heller) testified that he was not familiar with Kaufman's reputation among those who knew him (App. 2005). Since the jurist did not know of that reputation, his evidence was properly ruled inadmissible. See *Michelson* v. *United States*, 335 U.S. 469, 472.

c. Burns:

Petitioner Burns states that the court erred by admitting hearsay statements of alleged co-conspirators before establishing by independent evidence the existence of the conspiracy and Burns' participation therein (Burns Pet. 10, 16–18). As Binstein, the first witness, gave evidence which showed that Burns knew of the conspiracy and was a member of it (App. 247,

[11] Dietz was named as a co-conspirator in the indictment, but his case was severed because of his health (App. 20, 22).

735, 858–859, 1900, 1970, 1971), Burns' testimony is simply that it was error to admit the portions of Binstein's testimony which preceded the testimony connecting Burns with the conspiracy. But as Binstein's testimony, which was given in chronological order, showed in its entirety that petitioner Burns was a member of the conspiracy (see *Glasser* v. *United States*, 315 U.S. 60, 74), it is plain that a timely foundation was laid for the admission of all of the co-conspirator declarations. See *Lutwak* v. *United States*, 344 U.S. 604, 607.

3. Petitioners Garber, Florea and Burns contend that certain items of documentary evidence were improperly received:

a. Garber:

Petitioner Garber contends that the compelled production of records of his company (Nassau Securities) before the grand jury violated his privilege against self-incrimination (Garber Pet. 3–9). He relies on *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, *Marchetti* v. *United States*, 390 U.S. 39, and similar cases, in which it was held that certain required information was violative of defendants' rights against self-incrimination. In those cases, however, the Court's rationale depended on the fact that the information was demanded of a group inherently suspect of criminal activities. By contrast, stock brokers are not as a group criminally suspect and the purpose of requiring them to record their transac-

tions [12] is to insure orderly business dealings and to promote commerce and collect transfer taxes. This Court has held that in these circumstances individuals may be required to produce their business records for use in a criminal proceeding. *Shapiro* v. *United States*, 335 U.S. 1; [13] see *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, 76.

b. Florea and Burns:

Florea and Burns claim that Binstein's record (Government Exhibit 1) with its daily entries recording purchases, sales and prices of the Donbar stock owned by Kroll during the May-June 1963 operation, and the secret payments to the brokers (App. 120–127) should not have been received. They also urge that the analyses of that exhibit made by Kroll's accountant Braun [14] on or shortly after June 11, 1963 (Government Exhibits 401–406), were inadmissible because Braun used oral information from Kroll and Binstein to sup-

[12] Securities and Exchange regulations require retention of records of securities transactions for six years. 17 C.F.R. 240.-17a–4(a).

[13] *Shapiro* was expressly distinguished in *Marchetti*, *supra*, 390 U.S. at 56–57 and *Haynes* v. *United States*, 390 U.S. 85, 98–99.

[14] Braun was called as a defense witness to contradict Binstein's testimony (App. 120–121, 404) that Braun had "set up" the form that Binstein used (Govt. Ex. 1). Braun testified that he had not done so, that he first saw the form on June 11, 1963, and that he then prepared analyses of sales, purchases and advances of the Donbar transactions (App. 3394–3395, 3400). On cross-examination, Braun was questioned concerning these analyses and Government Exhibit 1.

plement the information contained in Government Exhibit 1 (Florea Pet. 28–36; Burns Pet. 8–10, 15–17).

Both Government Exhibit 1, made by Binstein, and the six analyses (Government Exhibits 401–406), made by accountant Braun were stated by each maker to be accurate records and to have been prepared contemporaneously with the events recorded or within a reasonable time thereafter (App. 120–121, 3446, 3481, 3487, 3497, 3752). Since they were business records designed to effect an accounting as to funds expended and proceeds received based on the Donbar stock distribution (see App. 3468, 3480, 3483), the indicia of reliability surrounding their making furnished a "circumstantial guarantee of trustworthiness" and rendered them admissible. See *United States* v. *Hickey*, 360 F. 2d 127, 143 (C.A. 7), certiorari denied, 385 U.S. 928; 28 U.S.C. 1732. Exclusion was not required on the grounds that the entries were based on oral reports received from others, that the transactions recorded were illegal, or that the records were intended to be confidential. *Grillo* v. *United States*, 336 F. 2d 211, 213 (C.A. 1), certiorari denied *sub nom. Gorin* v. *United States*, 379 U.S. 971; *United States* v. *Re*, 336 F. 2d 306, 312–313 (C.A. 2), certiorari denied, 379 U.S. 904; *United States* v. *Cohen*, 384 F. 2d 699, 701 (C.A. 2); *Pritchard* v. *United States*, 386 F. 2d 760, 768 (C.A. 8), certiorari denied *sub nom. Borchelt* v. *United States*, 390 U.S. 1004. Nor were the records of Binstein and Braun required to be complete or maintained in the most efficient manner to make them admissible. *Johnson* v. *United States*, 325 F. 2d 709, 711 (C.A. 1);

United States v. *Kelly*, 349 F. 2d 720, 774 (C.A. 2), certiorari denied, 384 U.S. 947.[5]

4. Petitioners Florea and Kaufman question the accuracy and fairness of certain portions of the court's instructions to the jury.

a. Florea:

The court initially instructed that the defendants were alleged to be members of a conspiracy to use the mails and other means of interstate commerce in an effort to defraud (App. 4720). Later, while instructing as to the substantive offenses charged, the court noted that, since the government was relying on the use of the mails, such use had to be found by the jury "even though the indictment" mentioned the use of other means of interstate commerce (App. 4758). Florea asserts that this instruction was insufficient to alert the jury to the requirement that, as to the conspiracy count, it had to find a use of the mails in an effort to defraud (Florea Pet. 13–15). But any doubt in this regard was allayed by the supplementary instruction to the jury, after the jury had

[5] At all events, these records were merely cumulative. Binstein testified he made payments to Florea after Florea had agreed to enlist willing brokers (App. 155). As to Burns, Binstein testified as to his conversation with him (App. 257), and that this record showed 4,000 share blocks of Donbar stock as bought by Burns (App. 253). In addition, Burns' cashier at his brokerage concern, without objection from Burns' counsel, authenticated his records relating to his purchases and sales of Donbar stock (App. 1717–1722), and various customers of Burns testified that they bought Donbar stock from him in June 1963, without being informed of the temporary price support being given to the stock nor the secret bonus money being given to their broker (*e.g.* App. 1959–1962, 1970–1972).

requested further instructions regarding the conspiracy count, that the government was "relying on the use of the mails only." (App. 4859).

Florea also questions the propriety of another instruction, stating that a supplementary instruction did not make it clear that the overt act which the jury had to find was committed on June 3, 1963 or thereafter (because of his statute of limitations defense at trial) was one which had to "be in furtherance of the conspiracy alleged" (Florea Pet. 16). The supplementary instruction did not use the word "furtherance" but did state that the jury had to find that at least one of the overt acts alleged by the government occurred or was committed on June 3, 1963 or thereafter (App. 4860). The jury had been previously informed that such acts must have been performed in furtherance of some object or purpose of the conspiracy charged (App. 4722). Since the supplementary instruction was focussed on the statute of limitation defense (App. 4859), it was not necessary to repeat the entire previous instruction dealing with overt acts. Moreover, a court's charge is to be read in its entirety. *Boyd* v. *United States*, 271 U.S. 104, 107; *United States* v. *Hamilton*, 420 F. 2d 1096 (C.A. 7). Accordingly, it is clear that petitioner Florea suffered no prejudice from the instructions given.

b. Kaufman:

Kaufman asserts that in answering two inquiries from the jury, the court erred by its "apparent affirmance" of his guilt (Kaufman Pet. 24–28). A read-

dictment; Seigenfeld was represented by two attorneys, a Mr. Wolpin and a Mr. Certilman, members of two different law firms (App. 5189–5190). After the indictment was returned, Seigenfeld retained Mr. Wolpin exclusively. Subsequently, Burns retained Mr. Certilman's firm (Wofsey) to defend him (App. 5190).[16] Mr. Wolpin objected that such representation of Burns might result in the divulgence of confidences made by Seigenfeld to Mr. Certilman while Seigenfeld was a client of the Wofsey firm (App. 5190, 5192, 5195). Government counsel also urged that the Wofsey firm should withdraw from its representation of Burns, relying on Canon 37 of the Canons of Professional Ethics which forbids representation which may result in the disclosure of the confidences of a client (App. 5208). The Wofsey firm protested (App. 5209, 5211, 5234), but the court ordered it to withdraw. (App. 5212, 5215). Prior to the date of that order, Burns had retained a Mr. Brodsky to serve as trial counsel, with the Wofsey firm to supply "expertise in securities matters" (App. 5203, 5253).[17] After the order in January 1969, Mr. Brodsky became sole counsel and thereafter represented Burns at the trial which commenced on May 5, 1969 (App. 2a). It is not

[16] The firm had represented Burns in civil matters for some prior years (App. 5248, 5263).

[17] Contrary to petitioner's claim (Burns Pet. 13), none of the partners of the Wofsey firm who made affidavits (in support of a writ of mandamus to permit them to continue to represent Burns) claimed that they represented Burns during the investigation which led to the indictment or that after the indictment, they did "extensive preparation" work in his defense (see App. 5263, 5269).

known what Seigenfeld may have told his former counsel, but Seigenfeld's trial counsel obviously contemplated having Seigenfeld testify in his own behalf (which he did) and he professed to fear a hostile cross-examination of his client by Burns' counsel. In view of such possibility, the order of disqualification of the Wofsey firm was not error. See *United States* v. *Trafficante*, 328 F. 2d 117 (C.A. 5); *Chugach Elec. Ass'n.* v. *United States D.C. for District of Alaska*, 370 F. 2d 441 (C.A. 9), certiorari denied *sub nom. Roderick* v. *Chugach Elec. Ass'n.*, 389 U.S. 820. Nor does it appear that petitioner was harmed by such disqualification in view of the earlier retention of Mr. Brodsky to serve as the trial counsel.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General,
WILL WILSON,
Assistant Attorney General,
ROGER A. PAULEY,
EDWARD FENIG,
Attorneys.

NOVEMBER 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970